

# NORTH CAROLINA GENERAL ASSEMBLY



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## PARTITION SALES STUDY COMMITTEE

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**REPORT TO THE  
2009 SESSION  
of the  
2009 GENERAL ASSEMBLY**

**FEBRUARY, 2009**

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# TRANSMITTAL LETTER

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The Partition Sales Study Committee respectfully submits the following report.

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**Representative Angela R. Bryant**  
Co-Chair

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**Senator Robert C. Atwater**  
Co-Chair

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# COMMITTEE INTRODUCTION

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The Partition Sales Study Committee was created by Part XLII of S.L. 2008-181 to address the impact of the partition sale procedures on the economic use and loss of heir property and farmland by heirs in North Carolina (*see* Appendix). The Committee consisted of 18 members including five members of the House of Representatives, five members of the Senate, two Clerks of Superior Court, and six members of the public with an expertise or stakeholder interest in the issue. Senator Robert C. Atwater and Representative Angela Bryant co-chaired the Committee.

The Committee was required to submit its final report, including legislative recommendations, to the 2009 General Assembly no later than March 1, 2009 and terminated on that date, or upon submission of its report, whichever occurred first.

## COMMITTEE MEMBERS

### President Pro Tempore's Appointments

#### *Senators*

Sen. Robert C. Atwater (Co-Chair)  
Sen. Charles Woodrow Albertson  
Sen. Philip Edward Berger  
Sen. Edward Walter Jones  
Sen. David F. Weinstein

#### *Public Members*

Mr. David H. Harris Jr.  
Hon. Richard E. Hunter Jr.  
Mr. Gregory C. Malhoit  
Ms. Pamela Thombs

### Speaker's Appointments

#### *Representatives*

Rep. Angela R. Bryant (Co-Chair)  
Rep. Lucy T. Allen  
Rep. Henry M. Michaux Jr.  
Rep. Timothy Lee Spear  
Rep. Paul B. Stam

#### *Public Members*

Hon. F. Gordon Battle  
Ms. Phylliss Craig-Taylor  
Hon. James C. Stanford  
Mr. Steve Woodson

## COMMITTEE STAFF

#### *Legal Staff*

Steven Rose, Research Division  
Brad Krehely, Research Division  
Ryan Blackledge, Bill Drafting Division

#### *Committee Clerks*

Carol Resar, Legislative Assistant to Sen. Atwater  
Karon Hardy, Legislative Assistant to Rep. Bryant

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# COMMITTEE PROCEEDINGS

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The Committee met four times, December 1, 2008, January 9, 2009, January 26, 2009, and February 18, 2009. Complete Committee minutes, including all written material submitted by persons who made formal presentations to the Committee, are permanently available in the Legislative Library.

## December 1, 2008

The Committee reviewed its charge with a presentation by Committee Co-counsel Brad Krehely. Following the review of the Committee's charge, the Committee heard presentations from the Honorable Richard E. Hunter, Jr., Clerk of Superior Court of Warren County and the Honorable James C. Stanford, Clerk of Superior Court of Orange County. Both are members of the Committee. They discussed property partition procedures, covering actual partitions and sales.

Faith Rivers, Associate Professor of Law at Elon University School of Law, made a presentation to the Committee that reviewed the history of heir property and joint property ownership. She also discussed some of the challenges poor landowners face from partition sales. Finally, she reviewed the procedures in South Carolina and Alabama.

Andrew Branan, Executive Director of the North Carolina Farm Transition Network, discussed the work of his organization in preventing problems associated with the partition of heir property. His organization approaches the problem using a planning and prevention approach in which the family tries to decide what they will want to happen to the land when the time comes. This involves consideration of what they have and which family members may wish to continue farming the land. This involves education of family members, as well as the professional people who might serve them, such as lawyers and accountants.

The Committee discussed what had been presented, as well as additional information it required. The Administrative Office of the Courts, the Real Property Section of the North Carolina Bar Association, and the Land Loss Prevention Project all offered to assist the Committee in its work.

## January 9, 2009

The Committee began its meeting with a presentation by Committee Co-counsel Ryan Blackledge who reviewed the North Carolina statutory provisions for partition actions.

John Pollock, Enforcement Director of the Alabama Fair Housing Center, presented an overview of partition procedures around the United States. Mr. Pollock made some specific suggestions for changes to North Carolina law that included:

- Require the Court to consider non-economic value of property in weighing sale.
- Allow a buyout option for partition sale opponents if division is not possible.
- Ensure that owners receive notice of the action.
- Establish sale procedures.

- Disallow the assessment of attorney's fees against parties that contest the sale.

The Committee also received presentations from Savonala Horne, Executive Director of the Land Loss Prevention Project, Anita Earls, Co-founder and Director of the Southern Coalition for Social Justice, and Mr. Mark Dorosin, Senior Attorney with the UNC Center for Civil Rights.

Ms. Horne submitted the following written recommendations to the Committee:

- Enhance notice requirements to ensure that owners are made aware of the partition proceeding.
- Provide a buyout option for partition sale opponents and a neutral appraisal.
- Enumerate non-economic factors as specified in the recommendation for evaluating the choice between actual partition and partition sale.
- Shield partition sale opponents from the assessment of attorney's fees when a forced sale occurs

Ms. Earls presented case studies of the sales of heir property in Orange County and submitted the following recommendations to the Committee:

- Require consideration of specific factors in determining whether partition in kind or sale of the land will be ordered.
- Establish a statutory procedure for co-tenants who oppose a sale to buy out other co-tenants that includes a court-obtained neutral appraisal.
- Eliminate opportunities for conflicts of interest.
- Increase the time to respond to a petition.

Mr. Dorosin made the following recommendations to the Committee:

- Give parties opposed to partition the right to purchase the petitioner's fractional interest ("buyout option").
- Strengthen existing statutory provisions against potential conflicts of interest.
- Prohibit the assessment of attorney's fees against parties opposed to partition.

Tom Steele, the immediate past chair of the Real Property Section of the North Carolina Bar Association, told the Committee that it is the opinion of the North Carolina Bar Association that the procedure for partition sales works well and should not be changed. The proposed changes would add more problems, delays and expense to the current partition sales process and unnecessarily burden family members. Speaking personally, he felt the Bar would not be opposed to changing the time for response to a partition petition from 10 days to 30 days.

Ms. Mariah West, Associate Legal Counsel for the Administrative Office of the Courts (AOC), presented data collected by the AOC. Based on an analysis of data from the past few years, approximately 29% of partition cases filed end up in a sale. The AOC, however, does not have more detailed information on who was involved in the cases or what circumstances led to a sale.

## Information from the Administrative Office of the Courts

Total Partition Cases Filed		Partition Cases Resulting in Sale	
Calendar Year	Cases	Fiscal Year	Cases
2005	510	2005-06	156
2006	594	2006-07	161
2007	561	2007-08	163

Mr. Blackledge then reviewed past bills introduced in the General Assembly to change the partition procedure, none of which had been enacted. He also cautioned the Committee that certain proposed buy-out provisions could raise constitutional issues if they favored one party over another or did not result in all parties receiving full value for their ownership share.

The Committee did receive a specific proposal to change the response time for answering a partition petition from 10 days to 30 days from Representative Paul Stam, a member of the Committee. Representative Stam also told the Committee that some of the suggestions it had received from presenters to the Committee could have the effect of devaluing the property of some tenants-in-common by 30-50%. He illustrated how the process can work successfully by discussing two of the partition cases he had handled in the past.

Co-chair Bryant asked the Committee members to submit proposals to Committee Counsel as soon as possible so they could be prepared for discussion at the next meeting of the Committee.

### January 26, 2009

The Committee received various suggestions for inclusion in the Committee's recommendations to the 2009 General Assembly. After a thorough discussion of the proposals, and in light of all the information the Committee had received at its previous meetings, the Committee approved all but the notice provisions for inclusion in the final report. The Committee suggested changes to the notice provision proposal, which were considered at the next meeting.

### February 18, 2009

After a thorough discussion of the notice provision proposal, the Committee approved the proposal with the removal of the sign portion of the notice provision. The Committee approved the final report and the proposed legislation beginning on page nine of this report.

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## FINDINGS

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Tenancy in common ownership is the most common form of concurrent land ownership. Without proper planning, however, tenancy in common ownership can lead to "heirs' property," where multiple family members own the same piece of land but where exact ownership is uncertain, usually due to generations of intestacy resulting in a large number of owners with an interest in the property. Though heirs' property can be avoided through careful legal planning, many low-income landowners lack resources and access to legal advice.

Any land held as a tenancy in common is susceptible to partition, either in-kind or by sale, and any one owner is legally empowered to bring a partition action at any time. Partition sales occur when the property cannot be divided into smaller parcels without "substantial injury" to the value of the land. Heirs' property is particularly vulnerable to partition because of the increasing number of owners over the generations. Partition sales of heirs' property have been noted in numerous studies by USDA and others as a cause of loss in small farmland ownership, particularly by African Americans.

Though North Carolina law favors division over the sale of jointly-owned property, it appears that many actions are brought, in the first instance, for the sale of the property, alleging that the property cannot be divided without producing less value to the owner than a share of the money proceeds from a sale of the whole. Parties petitioning for the sale are usually represented by counsel, but the respondents to the sale action are often not represented by counsel. Based on sample cases presented to this Committee, when counsel are involved on both sides it appears more likely that that partition cases are dismissed and, the Committee assumes, satisfactorily resolved among the owners.

The North Carolina standard of "substantial injury" and material impairment of cotenant rights in order to force a sale is a financial/economic determination -- i.e. whether the fair market value of a share in-kind would be materially less than a share of the money from a sale of the whole. That eliminates any consideration of factors such as ancestral attachment, historical value, use of property, longstanding ownership and upkeep of the property, use of property for livelihood, provision of eldercare, or companionship for prior owners.

In some cases involving heirs' property, there can be unknown and unlocatable owners who, without due diligence on the part of petitioners, will not get actual notice of the proceedings.

The practical likelihood and ease of getting a forced sale raises some fairness issues for respondents, especially those of lower income, who want to keep possession and ownership of their property. Though the law favors partition in-kind and provides for many options to favor partition in-kind, e.g. division in part and sale in part, a lack of legal representation for respondents makes a forced sale more likely.

There are several opportunities for the appearance of a conflict of interest -- attorneys representing the parties being allowed to serve as commissioners for the division and the sale and attorneys representing the parties being involved in the selection of the Guardian Ad Litem for the unknown or unlocatable heirs.

There is also a fairness issue in that parties who are opposed to the partition sale are often forced to pay a share of the attorneys' fees of the petitioner who forces the sale. The attorneys' fees are usually awarded by the clerk, in their discretion, from the sale proceeds before the co-tenants are paid their proportional shares from proceeds that are often the result of below market value sales.

The Real Property Section of the North Carolina Bar Association and the North Carolina Land Title Association emphasize that the current partition sales system has stood the test of time and is an equitable and expeditious method for co-owners to resolve differences without expensive, protracted, adversarial litigation and that partition is an absolute right of a tenant in common.

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# PROPOSED LEGISLATION

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## **EXTEND DEADLINE FOR COMMISSIONERS' REPORT**

**SECTION x.** G.S. 46-17 reads as rewritten:

### **"§ 46-17. Report of commissioners; contents; filing.**

The commissioners, within a reasonable time, not exceeding ~~60~~ 90 days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in ~~his~~ the clerk's discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding 60 days. This proviso shall be applicable to proceedings now pending for the partition of real property."

## **EXTEND DEADLINE FOR ANSWERING A SUMMONS**

**SECTION x.(a)** G.S. 1-394 reads as rewritten:

### **"§ 1-394. Contested special proceedings; commencement; summons.**

Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4(a) of the Rules of Civil

Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, in partition proceedings under Chapter 46 of the General Statutes or where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within 30 days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer."

**SECTION x.(b)** Article 1 of Chapter 46 of the General Statutes is amended by adding a new section to read:

**"§ 46-2.1 Summons.**

In partition proceedings initiated under this Chapter, the period of time for answering a summons is provided in G.S. 1-394."

**CREDIT FOR CO-OWNER INTEREST WHEN PURCHASING PROPERTY**

**SECTION x.** G.S. 46-28 reads as rewritten:

**"§ 46-28. Sale procedure.**

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General ~~Statutes.~~ Statutes, except as provided herein.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b.

(c) Any cotenant making an offer in a sale of an entire parcel shall receive credit for the interest the cotenant already owns and shall receive a corresponding reduction in the amount of money owed after deducting the costs and fees associated with the sale. When making a joint offer, cotenants may aggregate the credit for the cotenants' interests."

**NOTICE PROVISIONS**

**SECTION x.** G.S. 46-6 reads as rewritten:

**"§ 46-6. Unknown parties; ~~summons and~~ summons, notice, and representation.**

(a) If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices as provided in this section. The petitioner must specifically allege in an affidavit or otherwise the facts showing what due diligence the petitioner exercised. The petitioner shall set forth facts based upon the personal knowledge of the petitioner concerning the methods, means,

and attempts to locate and to effect personal service on the unknown or unlocatable persons, including efforts to utilize, review, or otherwise draw upon sources of information readily available to the petitioner, including Internet sources. Before ordering notice by publication, the clerk must determine that petitioner did exercise due diligence in attempting to find unknown or unlocatable persons who may have an interest in the property.

(b) The court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. The notice by publication shall include a description of the property which includes the street address or other common designation for the property, the legal description, and the acreage of the property.

(c) If Before or after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall ~~in its discretion~~ appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. For purposes of this section, attorneys who currently represent the parties in the pending partition proceeding and attorneys who have previously represented the parties in a related partition proceeding cannot represent unknown or unlocatable persons who may have an interest in the property."

## **ATTORNEYS REPRESENTING PARTIES CANNOT BE COMMISSIONERS**

**SECTION x.** G.S. 46-7 reads as rewritten:

### **"§ 46-7. Commissioners appointed.**

The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. For purposes of this section, attorneys who currently represent the parties in the pending partition proceeding and attorneys who have previously represented the parties in a related partition proceeding are not "disinterested" and cannot serve as commissioners, except by consent of the parties."

## **INELIGIBLE SELLERS AND PURCHASERS**

**SECTION x.(a)** G.S. 46-31 reads as rewritten:

### **"§ 46-31. ~~Clerk not to appoint self, assistant or deputy to sell real property.~~ Who may not hold sale.**

No clerk of the superior court shall appoint himself or his assistant or deputy to make sale of any property in any proceeding before him. The following persons shall not sell or be appointed to sell the property in a partition sale under Article 2 of Chapter 46 of the General Statutes:

- (1) The clerk of superior court, the clerk's assistant clerk, or the clerk's deputy clerk if there has been a proceeding before that clerk of court.
- (2) Attorneys who currently represent the parties in the pending partition proceeding.
- (3) Attorneys who have previously represented the parties in a related partition proceeding."

**SECTION x.(b)** Article 4 of Chapter 46 is amended by adding a new section to read:

**"§ 46-31.1. Ineligible Purchasers.**

The following persons are not eligible to purchase land in a partition sale under Article 2 of Chapter 46 of the General Statutes:

- (1) Attorneys who currently represent the parties in the pending partition proceeding or the attorneys' agents.
- (2) Attorneys who have previously represented the parties in a related partition proceeding or the attorneys' agents.
- (3) Commissioners who have been involved in the partition proceedings at any time or the commissioners' agents.
- (4) Appraisers who have been involved in the partition proceedings at any time or the appraisers' agents."

**APPRAISAL BEFORE SALE CONFIRMED BY COURT**

**SECTION x.** G.S. 46-28.1 reads as rewritten:

**"§ 46-28.1. Petition for revocation of confirmation order.**

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

- (1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.
- (2) In the case of any party to the partition proceeding:
  - a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or
  - b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or
  - c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

- (1) A lien remains unsatisfied on the property to be conveyed; and
- (2) The purchaser has not agreed in writing to assume the lien; and
- (3) The lien will not be satisfied out of the proceeds of the sale; and

- (4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(d1) In the case of a petition brought pursuant to c. of subsection (a)(2), the court shall order an independent appraisal. Based on the appraisal, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer. The cost of an independent appraisal shall be apportioned to all parties, pro rata.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale. The procedure for a resale is the same as is provided for an original public sale under Article 29A of Chapter 1 of the General Statutes."

## **BUYOUT PROVISION**

**SECTION x.** Article 2 of Chapter 46 of the General Statutes is amended by adding a new section to read:

### **"§ 46-22.1. Sale of cotenants' interest in lieu of sale of property.**

(a) If the court determines the property cannot be partitioned in-kind as provided in this Chapter, the court shall, prior to ordering a sale of the property described in the petition, or of any part, allow the nonpetitioning cotenants to purchase the petitioner's interest in the property (the 'buyout option'). The court shall explain the buyout option procedures to any cotenant who appears in person before the court without counsel.

(b) Within 15 days of the determination that the property cannot be divided in-kind, a petitioner may, with permission of the court, withdraw as petitioner and become a nonpetitioning cotenant with the ability to purchase the interest of any petitioners. Likewise, a nonpetitioning cotenant who wishes to be bought out may, with permission of the court, become a petitioner. If no petitioner remains in the partition action 15 days after the court determines that the property cannot be partitioned in-kind, then the proceeding shall be dismissed and the petitioners who have withdrawn shall be liable for the costs of the action.

(c) A nonpetitioning cotenant who wishes to exercise the buyout option shall notify the court of the cotenant's intent no sooner than 15 days and no later than 30 days after the court has determined that the property cannot be partitioned in-kind. A nonpetitioning cotenant may purchase an interest in the property as provided in this section even if a default judgment has been entered against the cotenant. If more than one nonpetitioning cotenant wishes to exercise the buyout option, each cotenant shall be entitled to purchase a portion of the available interest equal to the cotenant's existing percentage ownership divided by the total percentage ownership of all cotenants participating in the buyout.

(d) If the cotenants cannot agree on the price of the petitioner's interest, the value of the interest shall be determined by one or more competent and independent real estate appraisers

approved and appointed by the court. A second appraiser shall be appointed if a second appraisal is requested by the cotenants and the court finds that a second appraisal is needed. The cost of any appraisals ordered pursuant to this section shall be taxed as part of the costs of court to all cotenants. Any of the cotenants may also submit an appraisal to the court from an appraiser not appointed by the court, but those cotenants shall pay the cost of that appraisal.

(e) An appraiser appointed under subsection (d) of this section shall file a written appraisal of the property to the court within 30 days of being appointed. If the court receives appraisals of different values, the court shall evaluate the appraisals and determine the weight to be given to each in determining the value of the interest subject to sale.

(f) If the petitioner objects to the value of the interest as determined by an appraiser, the petitioner shall file written notice of the objection with the court no later than 10 days after the filing of the appraiser's report and shall request a hearing on the value of the interest subject to sale. The court shall hold a hearing limited to determining the value of the interest subject to sale and, after hearing evidence as to the issue, shall enter an order stating the value.

(g) Upon a determination of the value of the interest as provided in this section, the nonpetitioning cotenants who have exercised the buyout option shall have 45 days to pay into the court the price set as the value of the interest. Upon payment of the price, the court shall order that the proper instruments transferring title in the interest be executed and delivered to the purchasing cotenants.

(h) If one or more but not all of the cotenants who exercised the buyout option under subsection (c) fail to pay the price set as the value of the interest, the remaining cotenants who exercised the buyout option may purchase a portion of the defaulting cotenant's interest by paying the price of the share into the court within 10 days after the expiration of the 45-day deadline provided in subsection (g) of this section. The portion that each of the remaining cotenants may purchase shall be equal to the cotenant's original percentage ownership divided by the total percentage ownership of all cotenants interested in purchasing the defaulting cotenant's interest. If none of the cotenants who exercised the buyout option pays the price set as the value of the interest, the court may order a sale of the property as provided in G.S. 46-22.

(i) This section shall not apply when there is a written tenants-in-common or joint tenants management agreement.

## **"SUBSTANTIAL INJURY" MULTIPLE FACTOR TEST**

**SECTION x.** G.S. 46-22 reads as rewritten:

### **"§ 46-22. Sale in lieu of partition.**

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) ~~"Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.~~ In determining "substantial injury," the court shall consider at least the following factors:

- (1) whether the property is able to be divided between the party or parties seeking a partition by sale and those seeking to remain tenants in common;
- (2) whether a partition in kind would apportion the property in such a way that the value of the parcels resulting from the division, in the aggregate, would be

- materially less than the actual value of the property if it was sold as a whole, based upon a valuation that takes into account the type of sale conditions under which the court-ordered sale would occur;
- (3) evidence of longstanding ownership by any individual owner as supplemented by the period of time that any person or persons that such a cotenant is or was related to by related by blood, marriage, or adoption who was in the chain of title owned an interest in the property;
  - (4) any owner's particular sentimental links with or attachment to the property, including any attachments arising out of the fact that the property has ancestral or other unique or special value to one or more of the co-owners;
  - (5) the use being made of the property by any of the owners and the degree to which this owner or owners would be harmed if they could not continue to use the property for these purposes;
  - (6) the degree to which the owners have contributed their pro rata share of the property taxes, insurance, and other carrying charges associated with maintaining ownership of the real property as well as the degree to which the owners have contributed to the physical improvement or the upkeep, of the property, including any upkeep related to protecting the interests of the owners against any person who has no legal claim to the property but who attempts to use the property without the consent of the owners; and
  - (7) any other economic or non-economic factors that the court finds appropriate to consider.

(c) In considering the factors set forth in Section 46-22(b) as well as any other economic or non-economic factor that the court may consider to be relevant, a court should not consider any single factor to be dispositive.

~~(e)~~(d) The court shall specifically find the facts supporting an order of sale of the property.

~~(d)~~(e) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section."

#### **NO ATTORNEYS' FEES CHARGED TO OPPONENTS OF SALE**

**SECTION x.(a)** Article 2 of Chapter 46 of the General Statutes is amended by adding a new section to read:

**"§ 46-22.2. Attorneys' fees prohibited.**

In a partition proceeding under Articles 1 or 2 of this Chapter, the court shall not assess attorneys' fees against a nonpetitioning cotenant who contests the partition or sale of the property by appearing in person before the court."

**SECTION x.(b)** G.S. 6-21(7) reads as rewritten:

**"§ 6-21. Costs allowed either party or apportioned in discretion of court.**

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

...

- (7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled ~~Partition~~. Partition, except as otherwise provided therein.

...

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4."

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## APPENDIX

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*Authorization for the Committee from S.L. 2008-181:*

**PART XLII. STUDY THE IMPACT OF PARTITION SALES OF REAL PROPERTY ON THE ECONOMIC USE AND LOSS OF HEIR PROPERTY AND FARMLAND BY HEIRS IN NORTH CAROLINA (H.B. 1527 – Bryant, Farmer-Butterfield, Allen, Harrison)**

**SECTION 42.1.** There is created the Partition Sales Study Committee to address the issue of the impact of the partition sale procedures on the economic use and loss of heir property and farmland by heirs in North Carolina.

**SECTION 42.2.** The Committee shall be comprised of 18 members as follows:

- (1) Nine members appointed by the Speaker of the House of Representatives as follows:
  - (a) Five members of the House of Representatives.
  - (b) A Clerk of Superior Court.
  - (c) Three members of the public with an expertise or stakeholder interest in the issue.
- (2) Nine members appointed by the President Pro Tempore of the Senate as follows:
  - (a) Five members of the Senate.
  - (b) A Clerk of Superior Court.
  - (c) Three members of the public with an expertise or stakeholder interest in the issue.

The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each designate a cochair of the Committee. A quorum of the Committee shall be a majority of its members. The Committee shall meet upon the joint call of the cochairs.

**SECTION 42.3.** The Committee shall study the laws and procedures concerning partition sales in North Carolina and how these laws affect landowners in the State, examining both the effectiveness and equity of the current law and exploring potential alternatives. Specifically, the Committee shall:

- (1) Review information about partition sales and examine current trends in partition sales in the State, especially related to sales initiated by strangers in interest to heirs or related cotenants.
- (2) Analyze research and information from North Carolina and other states and jurisdictions regarding the effect of partition laws on desired land retention and economic development.
- (3) Analyze information concerning the comparative frequency of partition sales vs. partition-in-kind in North Carolina.
- (4) Identify and assess alternative partition sales laws from other states.
- (5) Explore how best to balance competing interests of the tenants in common in the partition sales context.
- (6) Identify and consult with academics who have studied partition sales nationally to determine their recommendations concerning best practices in partition proceedings.
- (7) Identify current barriers to the adoption of best practices recommendations and to alternative laws adopted by other states and potential options to address these barriers.
- (8) Prepare a report with a statement of the issues and a summary of the research including the Committee's recommendations concerning any needed

improvements and draft legislation to address any inequities presented by partition sales in North Carolina.

**SECTION 42.4.** Members of the Committee shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to the Committee to aid in its work. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. Subject to the approval of the Legislative Services Commission, the Committee may meet in the Legislative Building or the Legislative Office Building. The Committee, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses.

**SECTION 42.5.** The Committee shall submit a final report of the results of its study, including any legislative recommendations, to the 2009 General Assembly no later than March 1, 2009. The Committee shall terminate on March 1, 2009, or upon the filing of its final report, whichever occurs first.